Supreme Court, U.S.
FILED

No. 01-1756 MAY 29 2002

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IN THE

Supreme Court of the United States

EDWARD LEROY SWINDELL,
and others of similar circumstances,

Petitioner,

—v.—

FLORIDA EAST COAST RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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77 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District and Circuit Court in the 11th Circuit have incorrectly failed to apply in this case the requirements of Rule 56 of the Federal Rules of Civil Procedure that a *pro se* litigant have actual notice of the requirements of Rule 56 before a summary judgment can be entered against him as demanded in a decision by the U.S. 2nd Circuit Court of Appeals and whether the failure by the 11th Circuit to establish a *PRO SE* office or officers in contrast to the 2nd Circuit and others is inherently detrimental to a *pro se* litigant's rights.

2. Whether the District and Circuit Courts have misconstrued the express will of Congress in applying a statute of limitations delineated in a statute requiring proof of negligence, the *Federal Employees Liability Act*, to two acts, *Safety Appliance Act* and *Boiler Inspection Act*, which rely on negligence *per se* and expressly omit a statute of limitations.

3. Whether the lower courts have misapplied the Discovery Rule and the rule expressed in *Urie v. Thompson*, regarding petitioner's second injury of emotional distress by employing a "Point of Time" standard rather than a "Period of Time" and consequently ruled on a matter of fact more appropriately left to the decision by a jury and whether the lower Court has denied the Petitioner justice by usurping the role of the jury as a trier of fact.

4. Whether the State Court of Florida erred in entering a judgment against the petitioner that was presented in the name of another and was filed with no notice to the petitioner who was not able to contest it and consequently was denied due process.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Edward LeRoy Swindell, a resident of the State of New York, who was an employee of the respondent and is bringing the present action on a *pro se* basis. There are additional former employees as listed in the Appendix hereto who may join in the action if the writ is successful and the action is remanded for trial. The respondent in this action is the Florida East Coast Railway Company who was the employer of the petitioner. The parent of the petitioner and the various subsidiaries are listed as follows:

Parent: Florida East Coast Industries, Inc.

Subsidiaries:

Florida East Coast Railway Company
Florida East Coast Highway Dispatch Company
Florida East Coast Inspections, Inc.
Florida East Coast Deliveries, Inc.
Railroad Concrete Crosstie Corporation
Railroad Track Construction Company
Operations Unlimited, Inc.
Florida Express Carrier, Inc.
Gran Central Corporation
Dade County Land Holding Company, Inc.
International Transit, Inc.

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STATEMENT OF BASIS FOR JURISDICTION

Jurisdiction for the petition for certiorari is based on the following:

1. Judgment US Court of Appeals, Eleventh Circuit entered and filed January 2, 2002.
2. Petition for Rehearing and Petition for Rehearing en banc (Rule 35, Federal Rules of Appellate Procedure) denied March 7, 2002.
3. The basis for jurisdiction in the District and Circuit Courts was predicated upon diversity of citizenship and violation of the following acts and laws of the United States:
    a. Safety Appliance Act, 45 USC Sec. 1-16 et seq.
    b. Boiler Inspection Act, 45 USC Sec. 22-34 et seq.
    c. Federal Employers Liability Act, 45 USC Sec. 51 et seq.
    d. Fifth and Fourteenth Amendment to the U,S. Constitution.
    e. Federal Rules of Civil Procedure, Rule 56, 28 U.S.C.A.
    f. 49 CFR Ch 11, Sec. 229.5 (m).

FEDERAL STATUTES, RULES, CONSTITUTIONAL PROVISIONS

Boiler Inspection Act. 45 USC Sec 22-34 et seq.

Federal Employers Liability Act, 45 USC Sec 51 et seq.

Fifth and Fourteenth Amendment, U.S. Constitution

Fed. Rules Civ. Proc., Rule 56, 28 USCA

49 CFR Ch 11, Sec. 229.5(m)

STATEMENT OF THE CASE, FACTS AND BASIS FOR FEDERAL JURISDICTION

Petitioner was employed by the defendant Florida East Coast Railway from January, 1939, until 1952, first as a laborer, January, 1939 to May, 1939, then as an apprentice, May, 1939 to 1943, and finally as an electrician and Diesel Locomotive Attendant from 1943 to 1952. He worked on steam and diesel locomotive overhaul and repair shops in St. Augustine and Miami, Florida as a laborer and later as an electrician and on "Line of Road" as a Diesel Locomotive attendant on trains that traveled between Miami and New York. As more fully described in the Appendix hereto, Mr. Swindell's duties required him to handle and be in close proximity to asbestos debris, dust and other toxic substances which permeated the repair shops and also were emitted by defective parts, such as ball cocks and cut-off steam valves, on the locomotives while in motion on-line-of-road.

No protective gear, such as masks or respirators, was issued to, or required to be worn in the shops by, other than the painters, who were universally white. The laborers and helpers, whose main function was in tearing the asbestos coating off of the locomotives so the boiler makers and machinists could effectuate needed repairs, were predominately African-American.

As a result of his constant exposure to asbestos fibers and dust, the Petitioner contracted asbestosis and was so diagnosed in 1994, by means of a cat scan. On March 16, 1996, Petitioner filed an action in Florida state court solely under the provisions of the *Federal Employers Liability Act* for negligent infliction of asbestosis. Prior to trial, Petitioner withdrew his action on June 11, 1998 "without prejudice" at the judge's request due to a verdict in another action in the Florida state court, *Osborne v. FEC,* which, incorrectly, absolved the railroad under FELA because of lack of foreseeability of asbestos harm and lack of knowledge, completely disregarding the common law duty of master to servant to provide him with safe material with which to work in a safe environment in which to work.

Shortly after the dismissal, Petitioner on September 11, 1998, filed in U.S. District Court, Southern District, New York, his legal state of residence for 45 years, an action under the Safety Appliance Act, the Boiler Inspection Act and the Federal Employer's Liability Act for damages resulting from contracting asbestosis and resultant emotional distress, a second injury which had arisen and become evident with a diagnosis of acute depression in April, 1997.

On March 26, 1999, the Judge in the New York District Court ruled that venue jurisdiction was not established for the defendant in New York and dismissed the action without prejudice to the petitioner seeking redress in an appropriate jurisdiction. This ruling was upheld on appeal in the Court of Appeals, Second Circuit on December 23, 1999.

On February 25, 2000, as early as practicable, the petitioner filed an action in the U.S. District Court in Jacksonville, Florida under the provisions of the Safety Appliance Act, the Boiler Inspection Act and the Federal

Employer's Liability Act for damages for injuries suffered from asbestosis, plus a second injury of emotional distress for acute depression which was diagnosed in April, 1997, after undergoing a seizure and hospitalization, and a separate count of abuse of process resulting from defendant's filing of a judgment without notice against the petitioner for unexplained charges in the state suit.

On March 30, 2001, the judge in the Florida District Court entered a summary judgment against the Petitioner on the basis that the action for the two injuries was time barred and that the cause of action for abuse of process was barred because of *res judicata* and could only be decided by the Supreme Court.

Petitioner appealed on the basis that there were no statute of limitations desired or delineated in the Safety Appliance Act or Boiler Inspection Act and, even if so, the statute was tolled under the first injury and that the onset of the second injury was within any limitation requirements, since the action in Florida was filed within three years of the onset of the second injury. The petitioner also raised the issue that there were facts involved, such as the date of knowledge of the onset of the second injury, better left to the determination of a jury. The judge's ruling was upheld on appeal and request for rehearing and rehearing *en banc* were denied on March 7, 2002.

ARGUMENTS

1.

THERE IS A DIFFERENCE IN INTERPRETATION OF THE REQUIREMENTS OF RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE BETWEEN THE 2ND CIRCUIT AND THE 11TH CIRCUIT AS TO THE REQUIREMENT THAT A *PRO SE* LITIGANT HAVE *ACTUAL NOTICE* OF REQUIREMENTS OF RULE 56 BEFORE A SUMMARY JUDGMENT CAN BE ENTERED AGAINST HIM. AS A CONSEQUENCE OF THE 11TH CIRCUIT'S FAILURE TO PROVIDE SUCH NOTICE, PETITIONER HAS BEEN DENIED DUE PROCESS AND HIS RIGHTS UNDER THE AFORESAID RULE.

It is the contention of the Petitioner Pro Se that the Eleventh Circuit has violated the requirements of Rule 56 of the Federal Rules of Civil Procedure that a *pro se* litigant must have *actual notice* of the requirements of Rule 56 before a summary judgment can be entered against him.

The requirement of notice is clearly stated in *Irby v. NYC Transit Authority*, Docket No. 00-9421, August 22, 2001, U.S. Court of Appeals, 2nd Circuit,: "We take this opportunity to remind district courts and litigants who move for summary judgment against *pro se* litigants that the failure to provide the *pro se* party with notice of the requirements of Rule 56 of the Federal Rules of Civil Procedure, and the consequences of noncompliance therewith, will result in *vacatur* of the summary judgment, no matter how meritorious."

The failure to provide notice in the present case had an immediate and deleterious effect upon the Petitioner

since he was unable to show proof of the time of occurrence of the "Second Injury" in the present action to counter the decision stating that time had run out under the statute of limitations. Failure to provide actual notice of the requirements of Rule 56 is fatal to the summary judgment decision and ruling.

It is further contended that the failure of the Eleventh Circuit to provide *pro se* litigants with access to a *pro se* office or officers such as is the case in other Circuits such as the Second Circuit is in violation of said Rule 56 and is a violation of due process and equal protection under the laws of the United States.

The Petitioner was not aware of what was required to show that the Second Injury relative to emotional distress did not occur until his hospitalization and diagnosis of *acute depresssion*. Although the judge referred to the Petitioner Pro Se suffering "mental anguish and extreme nervousness over the prospects of developing cancer" in the complaint in the state case in Florida, the petitioner was cleared of any emotional disturbance at examination by his own physician and those of the defendant prior to trial. To hold the Petitioner responsible for knowing or "should have known" he had an illness when he was cleared by two physicians is requiring more of a layman than can be expected. The judge in this case placed himself in the position of making a medical diagnosis in contravention of two medical professionals. That is a decision he is not qualified to make. It is doubtful that 'mental anguish' can stand alone as a "second injury". At the least this was an arguable fact and a genuine issue of material fact that should have been allowed to be presented, and should have been presented, to a jury for resolution. *Cronin v. Aetna Life Ims. Co.*, 46 F. 3d 196 (2d Cir. 1995). On a motion for summary judgment, a court "cannot try issues of fact; it can

only determine whether there are issues to be tried." *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987).

An appeals court is required to construe all facts and inferences drawn from them in the light most favorable to the non-movant party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.; *Sledge v. Goodyear Dunlop Tires North America, Ltd.*, slip p. 977, 275 F.3d 1014 (2001); *Cofield v. Goldkist, Inc.*, slip p. 238, 267 F.3d 1264 (2001); *Gerling Global Reinsurance Corp. of America v. Gallagher*, slip p.163, 267 F3d 1228 (2001); *Pipkins v. City of Temple Terrace, Fla.*, slip p.138, 267 F3d 1197 (2001); *DeJulio v, Georgia*, slip p. 1072, 276 F.3d 1244. (2001). In this case the courts have failed to follow their own precedents and indeed appear to have gone out of their way to deny the Petitioner justice, perhaps because of the nature of his illness.

2.

THE LOWER COURTS HAVE MISCONSTRUED THE EXPRESS WILL OF CONGRESS IN APPLYING A STATUTE OF LIMITATIONS DELINEATED IN A STATUTE REQUIRING PROOF OF NEGLIGENCE, *THE FEDERAL EMPLOYERS LIABILITY ACT*, TO TWO STATUTES, *SAFETY APPLIANCE ACT* AND *BOILER INSPECTION ACT*, WHICH RELY ON *NEGLIGENCE PER SE* AND EXPRESSLY OMIT A STATUTE OF LIMITATIONS.

Although Petitioner brought the original action in Florida state court solely under the act first listed below (FELA), Petitioner brought the action in the Federal courts under three separate Acts of Congress:

Federal Employers Liability Act

Safety Appliance Act

Boiler Inspection Act

In only one of the Acts, the Federal Employers Liability Act, did Congress specify a statute of limitation period, yet lower Courts have often attempted to assign the three year period in FELA to the other two acts on an *ex post facto* basis. It is Petitioner's contention that this assignation is incorrect and contrary to the will of Congress and public policy. FELA requires proof of negligence and it is reasonable to assume that recollections and potential proofs could erode over time, so time limitation is necessary to protect potential defendants. However, both the Safety Appliance Act and the Boiler Inspection Act specifically deal with *negligence per se*. In violations of those acts, it is the injury that defines the tort, regardless of intent.

Consequently, a statute of limitations plays no part and should have no effect. After careful review of cases brought under it and its provisions, Justice Black clearly stated that the Safety Appliance Act contains no statute of limitations. *Herb v. Pitcairn*, 324 U.S. 117 (1945). In cases brought solely under the SAA, there is no discussion of or imposition of a statute of limitations.

It is clear by looking at the dates of adoption of the three Acts in question that had Congress wished to apply the statute of limitations contained in FELA to the other two Acts, or any statute at all, there was certainly time and opportunity to do so when it amended the statutes. But the fact is that Congress did not and the courts should not usurp Congress's prerogatives and authority.

> "Courts must presume that a legislature says in a statute what it means and means in a statute what it

says there." *Florida East Coast Ry. Co. v. City of West Palm Beach*, slip p. 65, 266 F.3d 1324 (2001). See also, *Burton v. Tampa Housing Authority*, slip p. 639, 271 F.3d 1274 (2001).

Congress' refusal to include a built-in limitation period does not require a court to borrow or impose one, nor should a court break with historic principles of equity in the enforcement of federally-created equitable rights. see *Holmberg v. Ambrecht*, 327 U.S. 392 (1946); *Auto Workes v. Hoosie Corp.*, 387 U.S. 696 (1966).

"Statute of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories and disappearing witnesses, and to avoid unfair surprise." *Johnson v. Railway Express Agency, Inc. ET AL*, 421 U.S. 454 (1975). None of these elements are present in this action and the defendants should be estopped from utilizing this defense to shield them from atoning for their malfeasance. The Petitioner has been attempting to bring this action on a steady basis since 1996. The defendant "had notice from the beginning that plaintiff was trying to enforce a claim against it" *Tiller v. Atlantic Coast R.R. Co.*, 323 U.S. 574 (1945). There is no surprise here, no fading of memories, no lost evidence, no disappearing witnesses, no need to protect the defendant. If Congress had desired a statute, they could have inserted one during the past century. Courts should resist the temptation to second guess Congressional intent. See *Iraola & CIA,S.A. v. Kimberly-Clark Corp.*, slip p. 505, 323 F3d 854. After all, there are in the present era methods of communication that were not available in timely fashion years ago.

Clearly, there is no evidence that Congress intended to expand the three year statute of limitations set forth in

FELA to the other acts. The statutes have separate purposes and are to remediate separate wrongs. Lower Courts that have ruled otherwise are directly acting contrary to the will of Congress. The lower Courts in this case have erred and the summary judgment must be vacated.

3.

WHETHER THE LOWER COURTS IN THIS ACTION HAVE MISAPPLIED THE DISCOVERY RULE IN ASSESSING THE COMMENCEMENT OF PETITIONER'S INJURIES.

The lower courts also have erred in failing to correctly apply the rule expressed in *Urie v. Thompson*, 337 U.S. 1263 (1949), that injuries related to asbestos exposure "are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves."

The consequence of this failure to apply the Urie rule and the Discovery Rule whose purpose is to exclude the period of time during which the injured party is reasonably unaware that an injury has been sustained, *Dalrymple v. Brown*, 7101 A.2d. 164, 167 (Pa. 1997), was to deny the Petitioner his rights under the *second injury* of emotional distress. While obviously the knowledge that one is suffering from asbestosis can raise concerns, anxiety and worries concerning the possibility of contracting cancer or other calamitous illnesses, not until the second injury can stand on its own can an individual bring an action for redress. *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997). The statute of limitations for a second injury commences when there exists an enforceable claim. *Sopha v. Owens-Corning Fiber-*

glass Corp., 98-1343 Sup. Ct. Wisc. (2000); *Pritzlaff v. Archdiocess of Milwaukee,* 194 Wis. 2d 302, 315, 533 N.W. 2d 780 (1995). The knowledge of the injury must be on the basis of *objective facts. Probate Estate of Raymond Krause et al. v. Shell Oil Co., et al.* Case No. 96-CV-72144-DT, 1/30/98, and the plaintiff must be aware that an actionable injury has been sustained. *Murphy v. Saavedra & Meadville Medical Center,* Supreme Ct. of Pennsylvania, Western District, PA. Appelate Ct. 2/16/2000. The second injury must be one capable of standing alone as a cause of action, *Sopha v. Owens-Corning Fiberglass Corp., supra.* If both his own and defendant's expert witnesses found no evidence of a second injury at the time of bringing the original suit, it is unreasonable for the judge in this case to find such "evidence" and punish the petitioner for not discovering what experts could not. It was clearly a *second* injury when the petitioner had a seizure and as a result was hospitalized. In any event, it would be a jury question.

Note also that under 49 CFR Ch 11 Sec. 229.5 (m), defining a serious injury under the Safety Appliance Act, the Boiler Inspection Act and ICC rules, under which Petitioner was required to work:

> "Serious injury means an injury that results in amputation of any appendage, the loss of sight in an eye, the fracture of a bone, or *confinement in a hospital for a period of more than 24 consecutive hours,*" (emphasis added)

If physicians relied upon by the defendant in this case as well as the Petitioner's own found no evidence of the second injury of emotional distress at the point of time of bringing the original suit in Florida, then it is farfetched for the Courts below to hold the Petitioner to a higher standard of expertise than professionals. It was

not until later, after a seizure, *hospitalization* and diagnosis by a psychiatrist in April, 1997, that the Petitioner became aware of a second injury and thereafter sought redress, well within the time limit required under FELA.

It is thus somewhat absurd for the lower courts to hold that cause of action accrued for the second injury involving emotional distress at commencement of the suit in the Florida State court when proof was offered in the record through both the Petitioner's medical experts and, more importantly, those of the defendant's who examined him that he was not suffering from an emotional injury, let alone one that could stand on its own for recovery. There is no conceivable way that someone could be expected to or should know of an injury if the evident facts known at that time are that he is not injured. The courts below were clearly bringing Alice in Wonderland logic to the case in order to deprive Petitioner of his rights. The second injury only grew and manifested itself on April 16, 1997, when Petitioner was hospitalized and diagnosed with having acute depression and that is when the FELA statute of limitations should have started to run in this action. Regardless, at the very least, this was an issue of fact best left to a jury to decide. *Tullius v. Albright,* slip p. 1364, 240 F3d 1317 (2001).

It must also be pointed out that the purposes of the acts under which this action has been brought are "humane and remedial", *Burnett v. New York Central R. Co.*, 380 U.S. 424 (1965), and actions should be construed in a light most favorable to the aggrieved. The courts below appear to have ignored this and instead have construed events in a manner most favorable to the wrongdoer.

The requirement for reasonable diligence under the Discovery Rule, as defined under *Sopha v. Owens-Corn-*

ing Fiberglass Corp., supra, is only applicable under *negligence* cases. *Salinas v. Gary Pools, Inc.,* SW erd, 2000, WL 1344509 (4th Court of Appeals-San Antonio, TX, September 20, 2000). As neither the SAA nor the BIA requires proof of negligence, the only test for petitioner was if he had *actually known* of the existence of this acute depression. The lower courts have ignored in the present action the generally accepted concept even within their own jurisdiction that the onset of a second injury is a genuine and material question of fact and should be left to a jury for determination. *Michael v. Norfolk Southern Railway Company*, U.S.C.A, 11th Cir. No. 94-9373-94-9374 (Feb. 6, 1996); *Augusta Iron and Steel Works, Inc. v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir 1988). "The point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury". *Hayward v. Medical Center of Beaver County,* 608 A.2d 1040 (Pa. 1992). "When the disease manifested itself was a question of fact not subject to resolution by summary judgment" *Celotex Corp. v. Copeland*, 471 So.2d 533, 539 (Fla. 1985); *Copeland v. Armstrong Cork Co.*, 447 So.2d 926 (Fla. 3d 1984).

4.

WHETHER THE PETITIONER WAS DENIED DUE PROCESS BY THE FLORIDA STATE COURT BY ITS ACCEPTING A JUDGMENT FOR FILING WITHOUT NOTICE TO THE PETITIONER AND WHETHER THIS WAS ABUSE OF PROCESS ON THE PART OF THE DEFENDANT ENTITLING PETITIONER TO REDRESS.

The Petitioner has attempted to argue under COUNT II of his cause of action that the filing of a judgment for costs by the defendant in the State Court of Florida was both a violation of due process and an abuse of process and that the defendant's actions brought it within the reach of this action and it is part of the action.

Petitioner received a notice addressed to an African-American claimant in another separate action against the defendant that the defendant was intending to levy costs against that person. Since it was the Petitioner's understanding that he had voluntarily dismissed his own action against the defendant under an agreement that each party would bear its own costs, there was no reason for him to think that this notice affected him in any way. This was the last that Petitioner knew of the matter until he was in Judge's chambers in White Plains, N.Y. at a pretrial hearing in September, 1998. At that time, the defendant's attorney offered to settle the case Petitioner was attempting to bring in return for vacating a judgment in Florida that the Petitioner later learned had been filed a few days after he had filed his action in the New York District Court.

The District Court judge in the 11th Circuit held that the use of the name of a party in another action altogether was not critical, but rather, inadvertent and a clerical error. This is the same judge who made a point of

warning the parties that he expected accuracy in pleadings. Putting the name of a party in a separate action on the heading of a notice to a party in another action is certainly of importance and more than a mere clerical error, at least as to proof of notice.

There is no knowledge as to how this notice issued in the name of one person transformed itself into a judgment directed against the petitioner without his knowing it, Something had to be filed with his name on it, but no notice was sent, given or received. This is more than a clerical error and inadvertence and the Petitioner should have the right to discover what occurred. The Petitioner's name has been sullied, his credit has been jeopardized and his rights have been tossed aside with a manifest lack of concern.

Indeed, it appears that the defendant delayed filing the judgment and appeared to use this "judgment" in a manner and attempt to dissuade the Petitioner from seeking justice. This action on the part of the defendant is a clear *prima facie* case of violation of due process and demonstrably a flagrant abuse of process. See, *Handbook of The Law of Torts,* William L. Prosser, Third Edition, 1964, Sec. 115 Abuse of Process, pp. 876-878: *Coplea v. Bybee,* 290 Ill.App. 117,8N.E. 2d 55 (1937); *Glidewell v. Murray-Lacey & Co.*, 124 Va. 563.98 S.E. 665, 4 A.L.R. 225 (1919); *Kool v. Lee*, 43 Utah 394, 134 P. 906 (1913). Petitioner has been damaged not only financially, but his credit rating and standing have been affected to a major degree *Gore v. Gorman's, Inc.*, W.D. Mo. 1956, 148 F.Supp.241.

SUMMARY

In summary, Petitioner prays for consideration of this petition for writ of certiorari for reasons of justice and because:

1. The decision in this case is in direct conflict with a decision rendered in the Second Circuit Court of Appeals as to the treatment of *PRO SE* litigants under Rule 56 of the Federal Rules of Civil Procedure and represents a flagrant denial of due process and strips protection specifically designed for the pro se litigant.

2. The courts in this action have made a decision regarding judicial review and disregard of congressional intent contrary to the U.S. Constitution and previous decisions of this Court and other jurisdictions and have usurped the power of the Congress.

3. The lower courts have decided an important question regarding onset of injury and imposition of summary judgment when there remains questions of fact in contradiction of long established federal law and decisions of this Court and others that would seriously affect the rights of the injured to receive justice for wrongs received.

4. This Court is the primary review of abuse of process of a state court which has harmed the Petitioner greatly.

5. Petitioner was misled by the judge in the district court and suffered great cost because of the judge advising the parties that he felt the case could be settled and scheduling a hearing before a mediator shortly before pre-trial, only to rule on the respondent's motion for summary

judgment nearly one year after it was submitted. This adversely affected petitioner as he had to contract with expert witnesses and undergo other expenses in preparation for trial.

Respectfully submitted,

EDWARD LEROY SWINDELL
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Petitioner Pro Se

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12263
Non-Argument Calendar
Filed January 2, 2002
D.C. Docket No. 00-00224-J-21

EDWARD LEROY SWINDELL,
and Others of Similar Circumstance,

Plaintiff-Appellant,

—versus—

FLORIDA EAST COAST RAILWAY CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
(January 2, 2002)

Before

CARNES, MARCUS and WILSON,
Circuit Judges.

PER CURIAM:

Edward LeRoy Swindell, a *pro se* litigant, appeals the district court's summary judgment in favor of Florida East Coast Railway Company ("Railway") in his action for monetary damages based on a Florida state court judgment and for physical and emotional damages under the Safety Appliance Act ("SAA"), 45 U.S.C. §§ 1-16; the Boiler Inspection Act ("BIA"), 45 U.S.C. §§ 22-34; and the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*. On appeal, Swindell argues that (1) the three-year statute-of-limitations period under FELA does not apply to his claims under the SAA and the BIA, and (2) the district court erred by finding that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine[1] over his monetary damages claim based on a previous state court action.

We review a summary judgment ruling *de novo*, applying the same legal standards used by the district court. *See Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1242-43 (11th Cir. 2001). Summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review questions of subject matter jurisdiction *de novo*. *See Singleton v. Apfel*, 231 F.3d 853, 856 (11th Cir. 2000).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The relevant facts are straightforward. On February 29, 2000, Swindell filed this suit against Railway. In

---

[1] *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S. Ct. 1303, 1314-15, 75 L. Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923).

Count I, he alleged that he was employed by Railway from 1939 until 1952, during which time he was exposed to toxic carcinogenic substances, which included asbestos and diesel exhaust fumes and debris, in violation of the BIA, the SAA, and the FELA, and that as a result, he suffered permanent physical and mental injuries. Swindell asserted that he first became fully aware of these injuries in 1997 when he underwent psychiatric care, consultation, and treatment. In Count II, Swindell alleged that Railway maliciously obtained a costs judgment in a prior state court action, which was based on the same underlying facts as this action, after he voluntarily dismissed the suit.

Railway filed a motion for summary judgment and argued that Swindell did not assert his cause of action within three years as required under the FELA, 45 U.S.C. § 56. Railway also argued that under the doctrine of *res judicata*, Swindell's claim based on the Florida state court judgment was barred. Railway attached Eric L. Leach's affidavit to the summary judgment motion. Leach stated that in June 1996, Swindell filed a suit against Railway in a Florida state court and alleged violations of the BIA, the SAA, and the FELA for exposure to asbestos containing products and diesel exhaust while he a Railway employee. According to Leach's affidavit, the Florida action was actively litigated for two years, when, on June 11, 1998, Swindell voluntarily dismissed the action and was taxed with costs. Also attached to the summary judgment motion was the complaint that was filed in Florida state court.

Swindell responded to the motion for summary judgment and argued that the SAA and the BIA did not contain statutes of limitations, and that a four-year limitations period applied rather than the three-year period enunciated under the FELA. Swindell also raised the following arguments: (1) that soon after he was diagnosed

with asbestosis, on February 4, 1994 he commenced an action in state court, thereby tolling the statute of limitations period; (2) that it was not until April 16, 1997 that he was diagnosed with severe emotional distress, and that the limitations period for his emotional injuries did not begin running before the date of his diagnosis; (3) that his prior to Florida state court action and an action in the Southern District of New York, which was dismissed on March 26, 1999 for improper forum based on venue considerations, *see Swindell v. Florida East Coast Railway Co.*, 42 F. Supp. 2d 320 (S.D.N.Y.), *aff'd*, 201 F.3d 432 (2d Cir. 1999) (unpublished table decision), tolled the statute of limitations period; and (4) that the claim against Railway for damages incurred due to the state costs judgment was not barred by *res judicata* because he was not properly served.

In granting summary judgment to Railway, the district court first made the following findings: (1) Swindell filed suit against Railway in Florida state court on June 7, 1996 and alleged permanent injuries to his lungs due to exposure to toxic substances; (2) Swindell filed a notice of voluntary dismissal on June 11, 1998, which provided in part that each party would bear their own costs; (3) Railway subsequently filed a motion to tax costs and obtained a judgment; (4) on September 11, 1998, Swindell filed suit in the Southern District of New York, claiming that he suffered physical and emotional injury as a result of his exposure to toxic substances in the course of his employment; (5) the district court in the New York action granted Railway's motion to dismiss for lack of jurisdiction by order dated March 26, 19991; and (6) Swindell then filed the instant action on February 29, 2000.

The district court held that neither the SAA nor the BIA provided Swindell with an independent source of redress, and that violations of those acts are actionable

only under the FELA. The FELA's three-year statute of limitations period accordingly applied to Swindell's action. The district court rejected Swindell's argument that the prior action in Florida state court tolled the limitations since Swindell voluntarily dismissed his Florida state action, and therefore equitable tolling did not apply during the pendency of the Florida state action.

The district court also noted that Swindell's state claim in Florida, which was filed on June 7, 1996, alleged both physical and emotional injuries related to his workplace exposure to asbestos and other toxic substances. The district court found that Swindell became aware of both the nature of his lung injuries and the connection to workplace exposure on February 4, 1994, and that although Swindell was not diagnosed and treated for emotional injuries until April 16, 1997, his symptoms first manifested themselves at least by June 7, 1996, when he filed his Florida state court claim. Thus, the district court concluded, the statute of limitations on Swindell's claims for emotional injuries began to run at the latest on June 7, 1996. While the limitations period was tolled during the pendency of the federal action in the Southern District of New York from the date it was filed (September 11, 1999) to the date it was dismissed (March 26, 1999), the district court found that the statute-of-limitations period was not tolled during Swindell's appeal from the district court's dismissal to the Second Circuit.

The district court concluded that the statutory period tolled approximately six and one-half months during the pendency of the New York action, and that Swindell's three-year limitations period therefore ended on or about January 7, 2000. The district court then ruled that Swindell's instant action, which was filed February 29, 2000, was time-barred. Finally, the district court found that it lacked jurisdiction over Count II of Swindell's

complaint, stating that the *Rooker-Feldman* doctrine did not allow it to review the state trial court proceedings. The district court granted Railway's motion for summary judgment. This appeal followed.

On appeal, Swindell first argues that the district court erred by holding that the FELA three-year statute of limitations applies to his claims under the SAA and the BIA. Neither the BIA nor the SAA confer any right of action. *See Urie v. Thompson*, 337 U.S. 163, 189, 69 S.Ct. 1018, 1034, 93 L.Ed. 1282 (1949). Rather, they merely make violations of their provisions "unlawful." *Id.* These Acts *supplement* the FELA. *See id.* It is well-established that actions under the BIA and the SAA are subject to the three-year statutory limitations period provided by FELA. *See id.* at 168; *Tiller v. Atlantic Coast Line R. Co*, 323 U.S. 574, 580-81, 65 S.Ct. 421, 424, 89 L.Ed. 465 (1945) (amendment alleging a violation of the BIA related back to the original petition and was therefore timely under the FELA's three-year statute-of-limitations period). We are unpersuaded by Swindell's arguments to apply a four-year limitations period instead. The district court did not err by holding that Swindell's action was time-barred.

Swindell also argues that he was not diagnosed with any emotional disorders until 1997, and that there was no evidence prior to that date that he was suffering from anything more than reasonable anxiety. Thus, Swindell urges, the tolling period began in 1997 and not 1996, as the district court found. Railway highlights the district court's finding that Swindell was aware of his symptoms of emotional injury no later than 1996, as evidenced by the allegations in his action filed in Florida state court, and that he had an affirmative duty to investigate its cause after that date. We agree.

Generally, a cause of action accrues and the statute of limitations begins when in the exercise of reasonable

diligence the claimant knew or should have know of the injury. *See Hill v. Georgia Power, Co.*, 796 F.2d 1071, 1074-1075 (11th Cir. 1986). Although it is essentially undisputed that Swindell was *diagnosed* with emotional problems in April 1997, he had previously filed a state action in Florida, in which he alleged that he suffered emotional injuries, which stemmed from his employment at Railway. Based on this prior state action, the district court found that Swindell was aware that he suffered from emotional injuries in 1996, although he might not have been aware of the full extent of the injuries. In light of Railway's motion for summary judgment and supporting documents, we can find no error in the district court's conclusion that, at the latest, Swindell knew, or should have know, that he suffered emotional injuries the day he filed his Florida state action, June 7, 1996.[2]

Swindell next challenges the district court's application of the *Rooker-Feldman*, doctrine to his supplemental state claim. Swindell argues that he is not seeking review, reversal, or invalidation of the Florida state court's judgment, but is merely seeking redress for the institution of wrongful civil proceedings and abuse of process. Under the *Rooker-Feldman* doctrine, federal

---

[2] Swindell's alternative argument, that the FELA limitations period was tolled during the pendency of his Florida state court action, which he voluntarily dismissed, is equally unpersuasive. *See Dade County v. Rohr Indus., Inc.*, 826 F.2d 983, 989 (11th Cir. 1987) (for purposes of FELA limitations period, the voluntary dismissal of a prior action has the effect of placing the parties in a position as if the earlier suit had never been filed, and the statutory limitations period is not tolled). The limitations period was also not tolled during Swindell's appeal from the district court's decision in the Southern District of New York. *Cf. Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir.) (en banc), *cert. denied*, 525 U.S. 1019 (1998) (the pendency of a class action tolls the applicable statute of limitations only until the district court makes a class certification decision, but not during a direct appeal of that decision).

courts, other than the United States Supreme Court, have no authority to review final judgments of state courts. *See Siegel v. LePore*, 234 F.3d 1163, 1172 (11th Cir. 2000). The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are "inextricably intertwined" with a state court judgment. *Id.* A federal claim is inextricably intertwined with a state court judgment " 'if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.' " *Id.* (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 1533, 95 L. Ed. 2d 1 (1987)). Notably, the *Rooker-Feldman* doctrine does *not* apply if the plaintiff had no "reasonable opportunity to raise this federal claim in state proceedings." *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996).

In Count II, Swindell asserted that the Florida state court's costs judgment was obtained without notice and with the intent to intimidate him. Swindell requested the district court to find that Railway practiced abuse of process and malicious prosecution in obtaining and executing the costs judgment, and requested damages in the amount of the judgment and for injury to his credit rating. Simply put, Swindell's claim of abuse of process and malicious prosecution would succeed *only* upon proof that the Florida state court judgment was erroneously obtained. The district court lacked subject matter jurisdiction over Swindell's second cause of action pursuant to the *Rooker-Feldman* doctrine, and correctly dismissed Count II under that doctrine.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12263-AA
Filed March 7, 2002

EDWARD LEROY SWINDELL,
and Others of Similar Circumstance,

Plaintiff-Appellant,

—versus—

FLA. E. COAST RR,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANK

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before:

CARNES, MARCUS and WILSON,
Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 3:00-CV-224-J-21TJC
FILED March 30, 2001

EDWARD LEROY SWINDELL,

Plaintiffs,

—V.—

FLORIDA EAST COAST RAILWAY COMPANY,

Defendant.

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, Edward Leroy Swindell take nothing, that the action be

dismissed on the merits, and that the defendant, Florida East Coast Railway Company recover the plaintiff, Edward Leroy Swindell their costs of action.

SHERYL L. LOESCH
Clerk

Date: March 30, 2001

JANE E. CUMMINGS
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

98 Civ. 6440 (WCC)

EDWARD LEROY SWINDELL,

Plaintiff,

—against—

FLORIDA EAST COAST RAILWAY COMPANY,

Defendant.

OPINION AND ORDER

APPEARANCES:

EDWARD LEROY SWINDELL
Plaintiff *Pro Se*
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Millbrook, New York 12545

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ILENE J. FELDMAN, ESQ.
Of Counsel

Conner, Senior D.J.:

This action for personal injuries is before the Court on defendant's motion to dismiss for lack of personal jurisdiction, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. For the reasons stated hereinafter, the motion is granted.

BACKGROUND

Plaintiff, Edward LeRoy Swindell ("plaintiff"), a resident of New York, brings this action against the defendant, Florida East Coast Railway ("defendant"), for injuries sustained while employed by defendant. Swindell worked as a laborer for defendant from 1939 to 1952, working exclusively in the state of Florida. Plaintiff claims that while employed by defendant, his work caused him to be exposed to asbestos and other toxic substances, causing him permanent physical and emotional injury. Plaintiff claims that the extent of these injuries was not discovered until 1997. This action seeks compensatory and punitive damages for such injuries.

Defendant asserts and plaintiff does not contest the following relevant facts. Defendant is a railway company and has its headquarters in St. Augustine, Florida. Defendant is a corporation duly established pursuant to the laws of the state of Florida; it is not incorporated under New York law nor registered to do business in the state of New York. Defendant does not have in the state of New York any office or place of business, mailing address, telephone, or bank accounts.

Plaintiff contends, however, that defendant is responsible for transporting persons and goods in and out of New York. He further argues that defendant previously maintained both freight and passenger agents in New York. Thus, for example, a passenger could go to a travel

agent or train station in New York and purchase a ticket for passage on defendant's trains. Finally, plaintiff alleges that defendant retains legal counsel in New York.

DISCUSSION

I. *Introduction*

The plaintiff bears the ultimate burden of proving the court's jurisdiction. *See Metropolitan Life Ins. Co. v. Roberston-Ceco Corp.*, 84 F.3d 560, 566(2d Cir. 1996); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981); *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87, 92 (2d Cir. 1975). However, when the issue is decided initially on the pleadings and without discovery, the plaintiff must only make a prima facie showing of personal jurisdiction to survive a motion to dismiss. *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir. 1993); *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984). All allegations must be construed in the light most favorable to the non-moving party, the plaintiff, and all doubts resolved in his favor. *A.I. Trade Finance*, 989 F.2d at 79-80. Personal jurisdiction will ultimately have to be established by a preponderance of the evidence, either at an evidentiary hearing or at trial.

Personal jurisdiction over a defendant in a diversity action in the United States District Court for the Southern District of New York is determined by reference to the relevant jurisdictional statutes of the state of New York. *See United States v. First Nat'l City Bank*, 379 U.S. 378, 381-82 (1965); *Beacon Enters. v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983). We turn to an examination of the only jurisdictional bases alleged by plaintiff—§ 301, § 302(a)(1), and § 302(a)(3) of the New York Civil Practice Law (hereafter "§ 301" and "§ 302").

II. *N.Y. Civ. Prac. Law § 301: "Doing Business"*

Under the New York courts' interpretation of § 301, a non-domiciliary corporation subjects itself to personal jurisdiction in New York with respect to any cause of action if it is "engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction." *Simonson v. International Bank*, 14 N.Y.2d 281, 285, 200 N.E.2d 427, 429, 251 N.Y.S.2d 433, 436 (1964) (internal quotations omitted). The non-domiciliary must be "doing business" in New York " 'not occasionally or casually, but with a fair measure of permanence and continuity.' " *Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 458 (1982) (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917)); *see also Katz Communications, Inc. v. Evening News Assn*, 705 F.2d 20, 23 (2d Cir. 1983).

Accumulating all of defendant's contacts with the forum set forth in the record, we conclude that the corporation is at most only "occasionally" doing business in New York and is not "engaged in such a continuous and systematic course of 'doing business' " in New York as to subject the corporation to personal jurisdiction under § 301. *Laufer*, 55 N.Y.2d at 310. Plaintiffs most plausible basis for asserting personal jurisdiction over defendant is his cryptic reference to the presence of sales agents in New York that sell passenger and cargo space aboard defendant's trains. However, it is an oft-cited principle that "mere solicitation" of business within New York does not satisfy § 301's requirements. *See, e.g., Elish v. St. Louis S.W.* Ry. Co., 305 N.Y. 267, 268, 112 N.E.2d 842, 843 (1953); *Laufer*, 55 N.Y.2d at 311. This is especially true when, as is the case regarding defendant's freight and passenger representatives, the company working in New York on behalf of the defendant is

an independently-owned profit-making organization, functioning as an independent contractor. *See Dunn v. Southern Charters, Inc.*, 506 F. Supp. 564, 567 (E.D.N.Y. 1981) (solicitation of orders for defendant's products through independent agents, brochures and trade magazines insufficient under § 301 in suit by purchaser); *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874,176 N.Y.S.2d 318 (1958); *Elish*, 305 N.Y. at 268.

Plaintiff also contends that defendant's trains transport persons and goods in and out of New York. In appropriate situations, such contact, coupled with the existence of representatives in New York to sell tickets or cargo space, has been ruled sufficient to establish personal jurisdiction. *See, e.g., Scanapico v. Richmond, Fredericksburg & Potomac R.R.* Co., 439 F.2d 17 (2d Cir. 1970) (en banc). In these cases, however, the courts have placed heavy emphasis on the fact that the solicitation was carried out by the defendant's "own employees." Id. at 21; *see also Bankhead Enters., Inc. v. Norfolk & Western Ry.* Co., 642 F.2d 802 (5th Cir. 1981). In contrast, plaintiff in the instant case alleges only that such solicitation was carried out by independent workers, such as travel agents or employees at separately owned train stations. In this regard, the instant case is almost identical to *Wilcox v. Pennsylvania R.R. Co.*, 269 F. Supp. 326, 328 n.6 (S.D.N.Y. 1967), in which the court found no personal jurisdiction where the defendant's "principal contact with the state is that it owns railroad cars which from time to time are brought into New York while in the management and control of interstate trains being operated by other railroad companies."[1] In so holding, the *Wilcox* court expressly distinguished the situation in which a railroad company might also own

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[1] The court in *Wilcox* analyzes § 302, but its reasoning can be analogized to § 301.

office space and maintain full-time employees within New York, but found that without such additional contacts, no personal jurisdiction could be established. *Id.* For the same reasons, we cannot find personal jurisdiction over defendant merely because some of its railroad cars, which have been "interlined" to other railroads, may pass through New York in trains operated by other railroads, or because completely independent workers in this state, not employed directly by defendant, may sell cargo and passenger space on defendant's trains, operating outside the state.

Finally, plaintiff claims that defendant's hiring of New York counsel to contest personal jurisdiction is sufficient to establish personal jurisdiction over defendant. This argument also must fail, because it is well established that a defendant does not waive its right to contest jurisdiction simply by moving to dismiss for lack thereof. *See, e.g., Martin v. New York State Dept. of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir. 1978). This would create an untenable "Catch-22" in which no defendant could contest personal jurisdiction, because the act of contesting jurisdiction would itself establish jurisdiction. Thus, none of these "contacts" cited by plaintiff, either in isolation or in aggregate, is sufficient to establish personal jurisdiction under § 301.

III. *N.Y. Civ. Prac. Law § 302*

We will first analyze plaintiffs § 302(a)(1) claim and then his claim made under § 302(a)(3).[2]

---

[2] It appears plaintiff makes no claim under § 302(a)(2), and even construing the pleadings liberally, we could imagine no plausible jurisdictional claim under this subsection. Further, even if an argument under § 302(a)(2) were properly before us, the tortious act must take place in New York under § 302(a)(2); as our discussion of § 302(a)(1) will make clear, plaintiffs claims of negligence by

A. *302(a)(1): "Transacting Business"*

Section 302(a)(1) provides:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state.

A defendant who is not "doing business" in New York within the meaning of § 301 may be sued in New York on a lesser showing of forum contacts if the cause of action arises from those contacts. To satisfy the "doing business" test under § 301, the corporation's activities in New York must be regular; if they are, the corporation is amenable to suit in the state on any claim, arising or not arising out of the New York acts. However, if the activity is not regular, but it is shown that the claim specifically arises out of whatever that local activity was, then the "transacting business" test of § 302 would be satisfied. *See generally Galgay v. Bulletin Co.*, 504 F.2d 1062, 1064 (2d Cir. 1974); *George Reiner and Co. v. Schwartz*, 41 N.Y.2d 648, 653-54, 363 N.E.2d 551, 554-55, 394 N.Y.S.2d 844, 847-48 (1977); David D. Siegel, New York Practice § 86 (2d ed. 1991). Thus, § 302(a)(1) requires not only that the defendant transact business in the state, but also the cause of action must arise from the very business transacted within the state.

---

defendant had nothing to do with any of defendant's activities within New York. *Feathers v. McLucas*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

Moreover, plaintiff makes no claim pursuant to § 302(4).

McShan v. Omega Louis Brandt Et Frere, S.A., 536 F.2d 516, 518 (2d Cir. 1976); *Fontanetta v. American Board of Internal Medicine*, 421 F.2d 355, 357 (2d Cir. 1970) (holding that § 302(a)(1) requires "a direct relation between the cause of action and the in-state conduct" as "an important condition of acquiring jurisdiction over the non-domiciliary defendant"); *McGowan v. Smith*, 52 N.Y.2d 268, 272, 419 N.E.2d 321, 323, 437 N.Y.S.2d 643, 645 (1981) ("[e]ssential to the maintenance of a suit against a non-domiciliary under CPLR 302(a)(1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon").

Even if we assume that defendant in this case was transacting some business within New York, plaintiff does not, and cannot, allege that there is any nexus between the business transacted within New York and the cause of action sued upon. *McGowan*, 52 N.Y.2d at 272. Plaintiff's complaint is grounded entirely in negligence, claiming, inter alia, negligent failure to warn, failure to instruct, and failure to provide plaintiff with a reasonably safe place to work. Complaint at 4-5. Assuming every allegation by plaintiff related to contact by defendant with the state of New York, i.e. that: (1) defendant is responsible for transporting persons and goods in and out of New York; (2) defendant previously maintained both freight and passenger representatives in New York; (3) defendant utilizes representatives in the state of New York; and (4) defendant has retained legal counsel in New York, we must still hold that these contacts have nothing to do with the cause of action alleged in the complaint. Plaintiff's claim is simple: his work site in Florida was unsafe. Agents selling freight and passenger space to customers in New York, the presence of New York counsel, and even the existence of trains running through the state of New York all have absolutely nothing to do with plaintiff's claim of a negli-

gently run work site in Florida. *See J W. Edwards v. St. Louis-San Francisco R.R. Co.*, 361 F.2d 946, 957 (7th Cir. 1966) ("it is abundantly clear . . . . that appellant's cause of action against the railroad did not arise out of any of the business activities carried on in [the state]").

B. *Section 302(a)(3)*

Plaintiff's claim under 302(a)(3) is equally unavailing. Section 302(a)(3) provides that a court may also exercise personal jurisdiction over a non-domiciliary if he/she:

> commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Thus, this subsection applies when a defendant commits a tortious act outside of New York that injures a plaintiff within New York. Plaintiff offers the creative argument that while the tortious activity took place in Florida, he developed emotional distress as a result of this tortious conduct in New York, and thus § 302(a)(3) applies. However, the case law does not support this contention. With respect to § 302(a)(3), it has been held that the original injury must occur in New York. If the injury occurs outside New York and merely becomes manifest in New York, or has its greatest consequences

in New York, the statute is not satisfied. *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 285 N.Y.S.2d 226 (N.Y. Sup. Ct. 1967); Siegel, New York Practice § 86A. Plaintiff's complaint clearly alleges that his exposure to dangerous materials in Florida caused him emotional distress. His alleged injury therefore occurred in Florida and not New York, just as the Vietnam veteran suffering Post-Traumatic Stress Disorder was injured in Vietnam, not in the American city to which he returned. Moreover, plaintiff's argument must fail because it would allow any injured party claiming emotional distress to move to any state in the country, and then claim that their injury was sustained in that state. This would abrogate the long-established rule that "an injury does not occur in New York simply because the plaintiff is domiciled . . . there." *Dogan v. Harbert Const.* Corp., 507 F. Supp. 254, 262 (S.D.N.Y. 1980); *Van Essche v. Leroy*, 692 F. Supp. 320, 325 (S.D.N.Y. 1988); *Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 402 N.E.2d 122, 425 N.Y.S.2d 783 (1980).

Further, even if plaintiff were able to establish that New York was the situs of his injury, he would be unable to satisfy the criteria of either § 302(a)(3)(i) or § 302(a)(3)(ii). In order to establish personal jurisdiction under § 302(a)(3), plaintiff must either show that the defendant is regularly "doing business" in New York under subsection (i), or, pursuant to subsection (ii), he must show that defendant could have reasonably foreseen that its acts would have consequences in the state of New York.

As to § 302(a)(3)(i), we note that the "doing business" test in this regard was not intended to be as rigorous as the test for "doing business" under § 301. Siegel, New York Practice § 88; 12th Jud. Conf. Rep. (1967) 343. However, for the same reasons as enumerated in our discussion of § 301, plaintiff has not presented us with sufficient evi-

dence to assure that the defendant's overall contact with New York is substantial enough to make it reasonable to subject the defendant to jurisdiction in the state.

As to § 302(a)(3)(ii), plaintiff is forced to argue that defendant could reasonably foresee that an employee would develop emotional distress as result of contact with asbestos while working in Florida, but such distress would not manifest itself for the entirety of the thirteen years plaintiff was working in Florida, and then plaintiff would move to New York, only to develop emotional distress here, forty-five years after he ceased employment with defendant. We hold that this unlikely scenario, even if true, was not reasonably foreseeable to defendant so that the corporation could expect to be sued in New York. For these reasons, plaintiff's argument under § 302, like his arguments under § 301, must fail.

IV. *Analysis Under the United States Constitution*

Finally, it is unnecessary to determine whether the exercise of personal jurisdiction would comport with federal constitutional standards of due process, *see, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), since a statutory basis for jurisdiction has not been established. *See Beacon Enters.*, 715 F.2d at 764 n.6. As interpreted by the New York state courts, §§ 301 and 302 do not extend personal jurisdiction to the limits of due process. *Id.; see also Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 459-60, 209 N.E.2d 68, 77-80, 261 N.Y.S.2d 8, 20-21 (1965).

CONCLUSION

Plaintiff has asked us to assert personal jurisdiction "in the interest of justice." We note, however, that our power under Article III is based on limited jurisdiction,

and we cannot assert jurisdiction except where expressly authorized by statute or the Constitution. Moreover, if we were to stretch the meaning of New York's laws in order to assert jurisdiction over the case, and plaintiff conducted arduous discovery and proceeded through a lengthy trial, only to have any award he received vacated by the Court of Appeals because this Court did not have jurisdiction over the defendant, the "interests of justice," even for plaintiff, would not be served.

Plaintiff also asks that, in the event we find no personal jurisdiction over defendant, "to transfer the action to an appropriate district." Plaintiff's Affidavit in Opposition to Motion to Dismiss at 4. Yet, absent personal jurisdiction, this Court cannot transfer this case to another jurisdiction. *See, e.g., Zhang v. Crisp,* 1995 WL 523724, *2 (N.D. Cal. Aug. 30, 1995). We therefore *dismiss this case without prejudice as to the merits of the claims raised herein, and leave plaintiff free to file his complaint in any court in which he believes jurisdiction is appropriate.*

Defendant's motion to dismiss the action in its entirety for lack of personal jurisdiction is granted. The action is dismissed without prejudice to re-filing in an appropriate forum.

SO ORDERED.

Dated: White Plains, NY
March 26, 1999

WILLIAM C. CONNER
Senior United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA (JACKSONVILLE)

Civil Docket for Case # 00-CV-224

Swindell v. Fla. E. Coast RR

Filed February 29, 2000

Assigned to: Judge Ralph W. Nimmons, Jr.

Jury demand: Plaintiff

Demand: $3,000,000

Nature of Suit: 330

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 45:51 Railways: Fed. Employer's Liability Act

EDWARD LEROY SWINDELL,
and Others of Similar Circumstance,

Plaintiff,

—v.—

FLA. E. COAST RR,

Defendant.

EDWARD LEROY SWINDELL
[NTC] [Pro Se]
P.O. Box 36
Tower Hill Rd.
Millbrook, NY 12545

ERIC L. LEACH
[COR LD NTC]
MILTON, LEACH, & D'ANDREA
& RITTER, P.A.
815 S. Main St., Suite 200
Jacksonville, FL 32207-8157
USA
904/346-3800

2/29/00	1	COMPLAINT filed; jury demand (mfk) [Entry date 03/01/00]
2/29/00	—	MAGISTRATE JUDGE CASE ASSIGNMENT Magistrate assigned: Timothy J. Corrigan (mfk) [Entry date 03/01/00]
2/29/00	—	FILING FEE PAID. (Filing Fee $ 150.00 Receipt # J619) (mfk) [Entry date 03/01/00]
2/29/00	—	SUMMONS(ES) issued for Fla. E. Coast RR . Consent(s) issued. (mfk) [Entry date 03/01/00]
3/24/00	2	NOTICE of designation under Local Rule 3.05 - TRACK 2. (ctc) (mfk)
3/31/00	3	ANSWER and affirmative defenses to [1-1] complaint by Fla. E. Coast RR (mfk) [Entry date 04/03/00]

3/31/00	3	(and) MOTION by Fla. E. Coast RR with memorandum in support to dismiss count II of plaintiff's complaint (mfk) [Entry date 04/03/00]
4/6/00	4	CERTIFICATE OF SERVICE of [2-1] track 2 notice by Edward LeRoy Swindell (mfk)
4/14/00	5	RESPONSE by Edward LeRoy Swindell to defendant's [3-1] answer (mfk)
4/14/00	5	(and) RESPONSE by Edward LeRoy Swindell to [3-1] motion to dismiss count II of plaintiff's complaint (mfk)
4/14/00	6	CERTIFICATE OF SERVICE of [5-1] response object, [5-1] motion response by Edward LeRoy Swindell (mfk)
4/24/00	7	MOTION by Fla. E. Coast RR for summary judgment, and supporting memorandum of law (mfk) [Entry date 04/25/00]
4/24/00	8	AFFIDAVIT of Eric L. Leach by Fla. E. Coast RR Re: [7-1] motion for summary judgment (mfk) [Entry date 04/25/00]
4/25/00	9	SUMMARY JUDGMENT NOTICE (mfk)
5/5/00	10	MOTION by Edward LeRoy Swindell to extend time to reply to defendant's motion for summary judgment (spw)
5/10/00	11	ORDER granting [10-1] motion to extend time to reply to defendant's motion for summary judgment, response to motion set to 5/22/00 for [7-1] motion for summary judgment by defendant (Signed by Judge Ralph W. Nimmons Jr.) ctc (mfk) [Entry date 05/11/00]

5/15/00	12	RESPONSE by Edward LeRoy Swindell to [7-1] motion for summary judgment (mfk)
5/16/00	13	MOTION by Fla. E. Coast RR with memorandum in support for leave to file reply to plaintiff's response to motion for summary judgment (mfk)
5/22/00	14	ORDER directing defendant's compliance with Local Rule 3.01(g); Defendant's counsel shall file a statement in regard to motion #13 by 06-02-00 (Signed by Judge Ralph W. Nimmons Jr.) ctc (mfk) [Entry date 05/23/00]
5/30/00	15	CASE MANAGEMENT REPORT (c: courtroom deputy) (lss)
5/30/00	16	NOTICE/CERTIFICATE OF COMPLIANCE by Fla. E. Coast RR Re: [13-1] order in regard to defendant's motion for leave to file reply brief (lss)
5/31/00	17	CASE MANAGEMENT AND SCHEDULING ORDER setting Third-party claims/Joinder of parties on 8/15/00; Discovery cutoff 1/31/01; dispositive motion filing deadline for 4/2/01; Final Pretrial conference for 10:30 5/31/01; Jury trial set during the term 7/2/01 through 07-25-01; Scheduled for Judge Ralph W. Nimmons Jr. (signed by Judge Ralph W. Nimmons Jr.) ctc (mfk)
5/31/00	18	ORDER directing answers to standard interrogatories. Response to standard interrogatories due 6/15/00 (Signed by Judge Ralph W. Nimmons Jr.) ctc (mfk)

6/9/00	19	ANSWERS to standard court-ordered interrogatories filed by Fla. E. Coast RR (jec)
6/12/00	20	RESPONSE to standard interrogatories filed by Edward LeRoy Swindell (mfk) [Entry date 06/13/00]
6/19/00	21	ORDER granting [13-1] motion for leave to file reply to plaintiff's response to motion for summary judgment (Signed by Judge Ralph W. Nimmons Jr.) ctc (mk) [Entry date 06/20/00]
7/5/00	22	REPLY by Fla. E. Coast RR to response to [7-1] motion for summary judgment (mfk) [Entry date 07/06/00]
7/28/00	23	MOTION by Edward LeRoy Swindell for leave to respond to defendant's reply to plaintiff's response to motion for summary judgment (mfk)
8/16/00	24	ORDER denying [23-1] motion for leave to respond to defendant's reply to plaintiff's response to motion for summary judgment (Signed by Judge Ralph W. Nimmons Jr.) ctc (mfk)
10/13/00	25	MOTION by Edward LeRoy Swindell to continue final pretrial conference (mfk)
12/8/00	26	NOTICE by Fla. E. Coast RR of change of address for counsel, Eric L. Leach (lpp) [Entry date 12/11/00]
1/16/01	27	NOTICE to the court by Fla. E. Coast RR regarding pendency of motions (ejw) [Entry date 01/17/01]
1/29/01	28	ORDER referring case to mediation. Appointing Dominic Caparello as media-

		tor. Conduct hearing by 5/18/01 Lead counsel, Eric L. Leach, to coordinate dates, and by 2/16/01 file a notice of mediation schedule. (Signed by Judge Ralph W. Nimmons Jr.) ctc (jec)
2/5/01	29	NOTICE to the Court pursuant to Local Rule 3.01(h), by Edward LeRoy Swindell (lrb) [Entry date 02/06/01] [Edit date 02/09/01]
2/15/01	30	AGREED MOTION by Fla. E. Coast RR to change mediator (AGREED) (jec)
2/16/01	31	ORDER on mediation: granting [30-1] agreed motion to change mediator, and Dominic Caparello is relieved of responsibility herein and the court appoints Alexandra K. Hedrick. Together with a copy of this order, the clerk shall provide a copy of the court's order, #28, to Ms. Hedrick as well as the mediator's report. Lead counsel shall file a notice of mediation schedule on or before 3/2/01. (Signed by Judge Ralph W. Nimmons Jr.) ctc (jec) [Entry date 02/20/01]
3/1/01	32	NOTICE of mediator schedule, conference set for 5/8/01 at 1:00 p.m. by Fla. E. Coast RR (jec)
3/1/01	—	DEADLINE updated; set mediation conference for 1:00 5/8/01 (jec)
3/2/01	33	ORDER on mediation schedule: The mediation conference shall be held with mediator Alexandra K. Hedrick on 5/8/01 at 1:00 p.m. (Signed by Judge Ralph W. Nimmons Jr.) ctc (jec)

3/22/01	34	AMENDED NOTICE of mediation date set for 5/8/01 at 1:00 p.m. (location only) by Alexandra K. Hedrick (jec) [Entry date 03/23/01]
3/23/01	35	MOTION by Edward LeRoy Swindell to compel defendant to respond to plaintiff's requests for production or inspection referred to Magistrate Judge Timothy J. Corrigan (jec)
3/23/01	36	NOTICE to the court that an additional 30 days have elapsed since plaintiff's reply to defendant's motion for summary judgment and plaintiff's motion for summary judgment as to count II has not been decided by the court through the present date, by Edward LeRoy Swindell (jec)
3/23/01	37	MOTION by Edward LeRoy Swindell to continue pretrial conference (titled, "Re: case management and scheduling order final pretrial conference, scheduled 5/31/01") (jec)
3/30/01	38	ORDER granting [7-1] motion for summary judgment, the clerk shall enter judgment for defendant Florida East Coast terminate all pending motions as moot and close the case; mooting [3-1] motion to dismiss count II of plaintiff's complaint, mooting [25-1] motion to continue final pretrial mooting [35-1] motion to compel defendant to respond to plaintiff's requests for production or inspection, mooting [37-1] motion to continue pretrial conference (Signed by Judge Ralph W. Nimmons Jr.) ctc (jec)

3/30/01	39	JUDGMENT for Fla. E. Coast RR against Edward LeRoy Swindell that plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff, their costs of action. Civil appeals checklist mailed. (Signed by Deputy Clerk) ctc (jec)
3/30/01	—	CASE CLOSED. (jec) [Entry date 04/03/01]
4/24/01	40	NOTICE OF APPEAL by Edward LeRoy Swindell re: [38-1] order, [39-1] judgment order. Filing fee $105.00; Receipt # J004583 Transcript information form due 5/8/01 ctc USCA #01-12263-A (seg) [Edit date 05/02/01]
4/24/01	—	TRANSMITTAL of initial appeal package to USCA consisting of certified copies of notice of appeal, docket sheet, order/judgment being appealed, and motion, if applicable, re: [40-1] appeal. Transcript information form sent. (seg)
5/2/01	—	NOTICE assigning 11th Circuit case number re: [40-1] appeal USCA case #: 01-12263-A (seg)
5/4/01	41	TRANSCRIPT INFORMATION FORM filed re: [40-1] appeal; no transcript is required for appeal purposes; Certificate of readiness due 5/18/01 USCA # not received (seg)
5/22/01	42	CERTIFICATE of readiness with certified copies of indexed district court docket sheet sent to USCA re: [40-1] appeal

		(ROA consists of: Volume pleadings: 1) USCA# 01-12263-A (seg)
5/29/01	—	ACKNOWLEDGMENT by USCA of receiving certificate of readiness on 5/24/01 re: [40-1] appeal USCA # 01-12263-A (seg) [Entry date 06/04/01]
7/13/01	—	REQUEST by USCA to forward record on appeal re: [40-1] appeal USCA # 01-12263-AA (seg)
7/13/01	—	RECORD ON APPEAL sent to USCA re: [40-1] appeal Transmittal includes: (ROA consists of: Volume pleadings: 1) USCA# 01-12263-A (seg)
7/24/01	—	ACKNOWLEDGMENT by USCA of receiving record on appeal on 7/16/01 re: [40-1] appeal USCA # 01-12263-AA (seg)
3/20/02	43	USCA DECISION (certified copy) [40-1] appeal affirming judgment/order. Mandate date: 3/18/02 USCA EOD: 1/2/02 USCA # 01-12263-AA (seg)
3/20/02	—	RECORD on appeal returned from USCA re: (ROA consists of: Volume pleadings: 1) USCA# 01-12263-AA (seg)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

D.C. No.: 3:00-cv-J-21TJC
U.S.CA. No.:

April 24, 2001

Mr. Thomas K. Kahn, Clerk
U.S. Court of Appeals–Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, GA 30303-3147

IN RE: Edward Leroy Swindell v. Florida East Coast Railway Company

Enclosed are documents regarding an appeal in this matter. Please acknowledge receipt on the enclosed copy of this letter.

X Copy of notice of appeal (Doc. #40), judgment & opinion/order under appeal, motion which is the subject of the order, and certified copy of docket entries enclosed.

X This is the first Notice of Appeal. (If not, date(s) other(s) filed: _____.)

This is a DEATH PENALTY appeal. Other cases: ___ _____.

X The appellate filing fee has been paid. Date paid: April 24, 2001.

The appellant ( ) was previously granted leave to proceed *in forma pauperis* in the District Court; has been ( ) granted ( ) denied leave to proceed *in forma pauperis* (copy of order enclosed).

Civil Appeal Statement Form furnished to appellant's counsel.

X The Judge/Magistrate Judge appealed from is the Honorable Ralph W. Nimmons, Jr.

The court reporter(s) is/are.

X There was no hearing from which a transcript could me made.

Other:

Sincerely,

c: Counsel of Record
Pro se parties (if any)

SANDRA GATZ
Deputy Clerk

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 96-011352 CA 42

EDWARD LEROY SWINDELL,

Plaintiff,

—VS.—

FLORIDA EAST COAST RAILWAY COMPANY,

Defendant.

NOTICE OF VOLUNTARY DISMISSAL

Pursuant to the provisions of Rule I.420(a), Florida Rules of Civil Procedure, the Plaintiffs, hereby voluntarily dismiss their claim, without prejudice, against the Defendant, FLORIDA EAST COAST RAILWAY COMPANY each party to bear their own costs.

I HEARBY CERTIFY that a true and correct copy of the foregoing was mailed this 11 day of June, 1998 to: William O. Solms, Jr., Esquire., Solms & Price, P.A. 6701 Sunset Drive, Suite 104, Miami, Florida 33143, Eric L. Leach, Esquire, Milton, Leach & D'Andrea, P.A., 1660 Prudential Drive, Suite 200, Jacksonville, Florida

32207 and Susan J. Cole, Esquire, 2801 Ponce de Leon Boulevard, Coral Gables, Florida 33134.

HIGH, STACK, LAZENBY, PALAHACH
MAXWELL & PLATT
3929 Ponce de Leon Boulevard
Coral Gables, Florida 33134
Telephone: (305) 443-3329

By: MICHAEL PALAHACH
MICHAEL PALAHACH
Florida Bar No. 164232

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 96-011352 CA 42

EDWARD LEROY SWINDELL and
MARY YOUNG SWINDELL, his wife,

Plaintiffs,

—VS.—

FLORIDA EAST COAST RAILWAY COMPANY,

Defendant.

AGREED ORDER ON DEFENDANT'S MOTION TO REMOVE CASE FROM TRIAL CALENDAR

THIS CAUSE came before the Court's Asbestos Motion Calendar on June 18, 1997, on Defendant's Motion to Remove Case from Trial Calendar. The Court having reviewed the file and being fully advised in the premises of agreement of the parties, it is hereby

ORDERED and ADJUDGED that the motion is hereby granted and this case will hereby be removed from the

trial docket of October 20, 1997, to be renoticed for trial by the parties.

DONE and ORDERED at Miami, Dade County, Florida, this 18th day of June, 1997.

JUDGE ROBBIE M. BARR
ROBBIE M. BARR
CIRCUIT COURT JUDGE

Copies furnished to all parties.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 96-011352 CA 42

EDWARD LEROY SWINDELL and
MARY YOUNG SWINDELL, his wife,

Plaintiffs,

—vs.—

FLORIDA EAST COAST RAILWAY COMPANY,

Defendant.

DEFENDANT'S MOTION TO TAX COSTS

COMES NOW, the Defendant, FLORIDA EAST COAST RAILWAY COMPANY (hereinafter referred to as "FEC"), by and through its undersigned attorney in it's Motion to Tax Costs saying:

1. Florida East Coast Railway, Co. after entry of Plaintiff's filing of his Voluntary Dismissal With Prejudice i entitled to tax its costs in the amount described hereafter.

2. The following were the costs incurred by the Defendant during the trial of the above-captioned case:

A. Process Service/Court Reporting/Transcribing Fees

11/21/96 Caplan, Markowitz & Kaye Inv.#44931	$21.00
11/21/96 Caplan, Markowitz & Kaye Inv.#449385	21.00
11/21/96 Caplan, Markowitz & Kaye Inv.#449386	21.00
11/21/96 Caplan, Markowitz & Kaye Inv.#449387	21.00
05/30/97 Caplan, Markowitz & Kaye Inv.#500970	20.00
06/11/97 Caplan, Markowitz & Kaye Inv.#495887	80.00
06/11/97 Caplan, Markowitz & Kaye Inv.#503096	45.00
02/25/97 Mudrick, Witt, Levy & Consor	418.28
03/04/97 Mudrick, Witt, Levy & Consor Inv.#720771	418.28
03/19/97 Mudrick, Witt, Levy & Consor	680.72
03/24/97 Mudrick, Witt, Levy & Consor Inv.#721159	680.72
07/07/97 Mudrick, Witt, Levy & Consor	154.44
03/18/97 The Caption Co. Inv.#SA9707167	778.20
05/15/97 Walsh Process Service & Legal Service	130.00
06/10/97 Walsh Process Service & Legal Service	125.00
06/12/97 Walsh Process Service & Legal Service	125.00
05/29/97 Goodenow Associates Service fee	125.00
	$3,864.64

B. Expert Witness/Witness Fees

11/15/96 I.A. Feingold, M.D. Inv.#96130	400.00
11/15/96 I.A. Feingold, M.D. expert witness fee	400.00
06/19/97 I.A. Feingold, M.D. expert witness fee	600.00
	$1,400.00
TOTAL TRIAL COSTS	$5,264.64
TOTAL COSTS TO DATE	$5,264.64

WHEREFORE, Florida East Coast Railway, Co. demands Entry of a Final Judgment for costs against *Rufus Walker* in the amount of $5,264.64.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5th day of July, 1998 furnished to Michael Palahach, Esq., High, Stack, Lazenby, Palahach & Del Amo, 3929 Ponce de Leon Boulevard, Coral Gables, Florida 33134, and Eric L. Leach, Esq., Milton, Leach & D'Andrea, P.A., 1660 Prudential Drive, Ste. 200, Jacksonville, Florida 32207.

b. Tolling of Statute of Limitations

The panel stated that the statute of limitations—if FELA's statute is deemed applicable—ended a month prior to the filing of the present action in the District Court of Florida. They specifically excluded from the tolling, the time of appeal from the venue decision in New York and relied on the decision *en banc* in *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, (11th Cir) (en banc), *cert. denied*, 525 U.S. 1019 (1998). The Armstrong case involved the question of whether an appeal in a separate class action case in which the appellants were no longer a party acted as a tolling with respect to them. To follow the reasoning of the panel would deny a potential appellant his right of appeal in a case of litigation close to the ending of a statute period. The appellant in this case would have been forced to forego his right to appeal the New York District Court decision and bring this case in Florida instead. The fact that he lost his appeal is of no matter. He would have been denied his true rights. It is not fair to punish the petitioner because the New York Court of Appeals was perhaps dilatory in rendering a decision. Had the Court rendered its decision one or two months earlier, the petitioner would have been able to file in the Florida District Court within the statutory period. As is inscribed above the portals of the so-called "Rocket Court" in Virginia:

"JUSTICE DELAYED IS JUSTICE DENIED".

It is clear that the appellant has not "slept on his rights", but has been continually attempting to achieve the justice that is his due. There has been no harm to the defendant, since he has been alerted well within the statutory period and all the facts and testimony have

been assembled in the Florida state case for presentation. The only harm is to the appellant pro se who is being most cruelly punished as he tries for recompense.

Re: 3yr. Statute of Limitations

		In Court	*Not in Court*
2/4/94	Diagnosed-Asbestosis Dr. Krainson		
			2yrs. 3months
3/16/96	Filed Case–State Court in Miami, Fla.		
		2yrs. 3months	
6/15/98	Filed for Discontinuance in Miami		
			0yrs 3months
9/11/98	Filed in US Dist Court White Plains, N.Y.		
		1yr. 3 months	
12/13/99	U.S. Court of Appeals ???? New York City–2nd Dist		
			0yrs. 2months 21days
2/25/2000	Filed in Dist Court–Jax 11th Dist		
		3years–6months	2years 8mos 21days

Note: Out of six years there was only *two years eight months that the matter was not in a court of competent jurisdiction.*

DAVID M. TOBOLOWSKY, M. D., FAPA
7400 NORTH KENDALL DRIVE, SUITE 310
MIAMI, FLORIDA 33156-7706
TELEPHONE (305) 670-1167 FAX (305) 670-8785

CONFIDENTIAL & PRIVILEGED

Psychiatric Report

March 29, 2002

Re: Edward Leroy Swindell
DOB 01-29-1922
SS# 262-01-0807

Mr. Swindell first consulted me April 16, 1997 and has been seen six times since the report dated April 24, 2001. I changed his antidepressant from Prozac to Wellbutrin SR 150 mg b.i.d., hoping for greater efficacy but his score on the CES-D has dropped only 7 points since November. He has significant difficulties with his memory, and his scores of 26/30 on the MMSE and 12/50 on the EXIT-25 suggest mild cognitive impairment or early Alzheimers disease. His TSH level was 1.374, which is normal. Accordingly, I have started him on Aricept 10 mg daily. He will contact me on his return to Miami in the winter.

My impressions were:

Axis I	Major depression, single episode	296.25
	Mild cognitive impairment	
	Ethanol abuse by history	
Axis II	Defer	
Axis III	Pulmonary asbestosis	
	Hypertension	
	Diabetes mellitus, type II	
	Sleep apnea	
	Unspecified heart condition	
Axis IV	None	
Axis V	Current, 50	

DAVID M. TOBOLOWSKY

David M. Tobolowsky, M. D., FAPA

Employee Duties

Work Description at Millers Shop (Locomotive Shop)

The duties of the plaintiff while working as a laborer at Miller Shops was to remove asbestos lagging from the boiler in accordance with CFR-49II or when leaks occurred. This asbestos lagging was either stored or ground-up to make asbestos mortar for use as mortar for insulation between asbestos lagging when the lagging was reinstalled. Should a serious steam leak develop under the lagging, and examination must be made and the leak located and the boiler must be taken out of service at once and thoroughly repaired pursuant to the rules. (1)

Work Description at Millers Shops (Coach Shop)

The duties of the plaintiff working as an electrician in the Coach Shop on passenger cars consisted of removing and repairing all types of electrical equipment: generators, motors, fans, lighting fixtures, batteries. The work was under and on the inside of coaches in for repair and/or overhaul.

Work Description While Operating Equipment on Line-of-Road Safety Standards

The duties of the Diesel Locomotive attendant on Line-of-Road was to operate the steam boiler (steam generator) in accordance with the rules and regulations of the Interstate Commerce Commission (1) with particular attention to CFR 49: Transportation, subtitle A and B Chapters I, II, 229.102-229/131

The instructions for the operation of the steam generator requires that it be operated at a safe working pressure with a minimum safety factor of four and equipped with an operable test valve or other means of determining whether the steam generator is filled with water. § 229.103

It was necessary that the plaintiff make inspections and sign reports on the locomotive in use. Each locomotive inspected after each trip and a report made-out and all defects found and reported on an approval form. § 230.104

The plaintiff General Requirements of Safety protection came under the CFR Ch. 11 § 229.41 and the definition of (m) serious injury came under § 229.5(m) (6)

Swindell Co-Workers

AF=Afro-American
W=Witness (Osborne)
SD=Deposition (Swindell)
OD=Deposition (Osborne)
E=Employee

Herman Mitchell
391 Warren Avenue
New Smyrna, Florida

(OD) C.H. Cody
391 Fortune Street
St. Augustine, Florida

(SD) R.V. Osborne
1320 Wildwood Drive
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